No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

VS.

RADCLIFF MATERIALS, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE OWENS-ILLINOIS, INC. AND CERTAIN OTHER DEFENDANTS IN THE CORRUGATED CONTAINER LITIGATION

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BRIEF OF AMICI CURIAE OWENS-ILLINOIS, INC. AND CERTAIN OTHER DEFENDANTS IN THE CORRUGATED CONTAINER LITIGATION

Owens-Illinois, Inc. and other *amici curiae* listed below submit that this Court should not recognize, either expressly or by implication, a contribution cause of action against settling antitrust defendants. Instead, it is submitted that the Court should specifically reject such a cause of action against settling antitrust defendants, irrespective of the Court's resolution of the contribution issues presented in this case.[1]

[1] Attorneys for petitioner and respondents have consented in writing to the filing of this brief. These written consents are being filed concurrently with the brief pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

The undersigned *amici curiae* are manufacturers of corrugated containers and sheets. They were among 37 co-defendants in numerous antitrust class actions that were consolidated in the *Corrugated Container* litigation (M.D.L. 310) in the District Court for the Southern District of Texas. The complaints in all of the actions charged the defendants with fixing prices of corrugated containers and sheets and thereby injuring the members of the alleged class of purchasers of such products. Before trial, the undersigned *amici* and other defendants settled the class claims for over $300 million and were dismissed from the actions.

As a result of those settlements, three of their co-defendants who had not settled with class plaintiffs, Westvaco Corporation ("Westvaco"), Packaging Corporation of America ("PCA"), and Georgia-Pacific Corporation ("Georgia-Pacific"), moved to amend their answers to assert (a) cross-claims for contribution against the settling defendants in the event that those non-settling defendants proceeded to trial and were found liable to plaintiffs, and (b) affirmative defenses alleging that, by virtue of the settlements, plaintiffs had waived that portion of their claims fairly allocable to the settling defendants ("claim reduction"). The District Court dismissed the proposed cross-claims; the Court of Appeals for the Fifth Circuit affirmed; and the three defendants (who had not yet settled) petitioned for a writ of certiorari, which this Court granted on June 16, 1980. *Westvaco Corp., et al.* v. *Adams Extract Co., et al.* (No. 79-972). However, between the filing of the petition for certiorari and the time for filing of respondents' briefs, all three petitioners settled the class claims. On October 20, 1980, this Court dismissed the writ

of certiorari, and on December 15, 1980, it denied the petition of Georgia-Pacific and PCA for rehearing.

A fourth non-settling defendant in the class actions, Mead Corporation ("Mead"), filed a separate complaint for contribution, which was dismissed in December 1979. Mead was not a party petitioner in the *Westvaco* appeal, *supra*. Since the dismissal order was entered in a separate proceeding filed by Mead, the dismissal order constituted a final appealable judgment. Mead elected, however, not to file a notice of appeal from the dismissal order and instead filed a motion for reconsideration by the District Court.

The trial of the class action cases in the District Court concluded on September 13, 1980 with a jury finding against Mead, ultimately the only non-settling defendant. The jury found that class members had been damaged in the amount of 5% of their purchases for the time period involved.

Although Mead was not a petitioner in the *Westvaco* case, on September 17, 1980 it petitioned this Court to intervene in that matter. In its papers in support of its petition to intervene, Mead argued that its claim for contribution remains pending in the District Court because its motion for reconsideration of the District Court's order dismissing that claim has not been resolved. Moreover, in an *amicus curiae* brief filed in this matter on December 18, 1980, Mead continues to assert its "rights to contribution." (Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 3.)

Thus, while the undersigned *amici* deny that Mead or any other party has any right to contribution against them, they continue to face threatened claims of liability for contribution. Petitioner here, Texas Industries, Inc., although seek-

ing relief in the particular situation in which it finds itself, asks this Court to recognize a general contribution cause of action. However, the recognition of such a general contribution cause of action, without clearly differentiating the fundamentally different situation involved in contribution claims against settling defendants, could have substantial adverse effects on the undersigned *amici curiae,* who settled in good faith with the class plaintiffs and thought that they had thereby bought peace with respect to the suits in question. They plainly have a fundamental interest in ensuring that, whatever the decision of the Court on the existence of contribution on the facts of this case, it should not establish a cause of action for contribution against settling antitrust defendants.

SUMMARY OF ARGUMENT

Although there has been a difference of opinion among the lower courts on the question of whether contribution in any form should be recognized in antitrust actions, no federal court has recognized a cause of action for contribution against settling antitrust defendants.

Settlements (which are recognized as a favored method of resolving litigation and disputes) would be deterred if this Court established a contribution cause of action against settling defendants. If a defendant considering settlement knew that even after settlement he still faced ongoing potential litigation and liability for contribution, he would have little incentive to settle.

Imposition of contribution liability on defendants (like these *amici curiae*) who settled in good faith and thought that they had made their peace with plaintiffs would also be contrary to the very fairness which petitioner claims contribution would achieve. In such circumstances, defendants

would have settled in order to obtain peace without receiving any of the advantages of settlement in return.

In addition, a contribution cause of action against settling antitrust defendants would complicate and lengthen already burdensome litigation. Contribution claims against settling defendants would in all likelihood need to be adjudicated in a second separate proceeding, in which the issue of any settling defendant's liability would have to be litigated without any benefit from the first trial.

ARGUMENT

Although the third-party complaints for contribution dismissed in the *Texas Industries* case were directed solely against non-defendants, petitioner has framed the issue on appeal in far more sweeping terms—i.e., whether an abstract "right" of "contribution" should be recognized in antitrust cases. However, contrary to petitioner's broad statement of the question, "contribution" is not an indivisible concept. Instead, it is merely a term used to refer to a variety of fundamentally different claims arising in a variety of factual situations.

Thus, it is true that questions such as whether an antitrust defendant should be permitted to implead or file an independent action for contribution against a non-defendant (the question presented in this case), or whether the disproportionate collection of an antitrust judgment against one defendant should entitle that defendant to sue fellow judgment debtors in order to equalize payment of the judgment, or whether an antitrust defendant who has settled with plaintiff is subject to claims for contribution, all in some sense involve "contribution". But each question raises different policy considerations, so that even if "contribution" were permissible in one situation, it may nonetheless be inappropriate in another.

In this case "contribution" surfaces in the context of *one* of the above scenarios, i.e., a third-party complaint against an unnamed, alleged co-conspirator not party to the original action. By framing the question before the Court in broad terms, however, petitioner raises a question whose resolution could directly, or by implication, have a great impact on persons (such as the undersigned *amici*) in distinctly different factual positions. Whatever may be the propriety of contribution in other situations, and irrespective of the Court's decision on the particular facts in *Texas Industries,* a contribution cause of action against settling antitrust defendants would so seriously threaten the rights of litigants and the efficient administration of the courts that it should be rejected by the Court. And, indeed, while there has been a difference of opinion among the lower courts on the question of whether contribution in any form should be recognized in antitrust actions, *no federal court has recognized a cause of action for contribution against settling antitrust defendants.* (See *infra,* pp. 10-11.)

There are cogent reasons why this Court should not judicially establish a contribution cause of action against *settling* defendants, whatever its decision on the specific facts here. Courts have consistently recognized the desirability of settlements, particularly in complex cases such as antitrust litigation. But if an antitrust defendant contemplating settlement knew that even after settlement he still faced ongoing potential litigation and liability for contribution, his incentive to settle would be effectively eliminated. Far from obtaining the peace and certainty associated with settlements, he would remain subject to indeterminate liability for contribution and be exposed to the expense and burden associated with litigating the contribution claims brought against him. Settlements would thus under-

standably—and to the detriment of the judicial system—be deterred. For these reasons, as more fully shown in Section I, *infra,* numerous courts confronted with the question have refused to impose contribution liability on a settling defendant.

Regardless of any advantages which might be urged for contribution in other contexts, imposing contribution liability on defendants who settled in good faith and at arms-length would only create gross inequities (see Section II, *infra*). Such defendants enter into settlements in order to dispose completely of the litigation and to buy their peace. If contribution claims against them were allowed, they would be in the position of paying substantial sums without receiving any of the advantages of settlement in return.

Finally, as shown in Section III, *infra,* establishing a contribution cause of action against settling defendants would aggravate the already formidable problems of judicial administration raised by complex antitrust litigation. As the *Corrugated Container* litigation illustrates, whatever might be the situation with respect to other types of contribution claims, contribution claims raised against settling antitrust defendants would normally have to be tried separately after resolution of the disputes between plaintiffs and non-settling defendants. Then, entry of a judgment against a non-settling defendant would necessitate a second complex antitrust proceeding; and, since the settling defendant would not have been a party to the original proceeding, the issue of its liability to the non-settling defendant would have to be litigated *ab initio.* Allowing contribution against settling antitrust defendants would therefore greatly expand the number and duration of complex antitrust suits brought in the federal courts.

I.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD DETER SETTLEMENTS

Settlement not only represents a mutually acceptable compromise between the parties, but also "contribute[s] greatly to the efficient utilization of . . . scarce judicial resources." *Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977); *D. H. Overmyer Co.* v. *Loflin,* 440 F.2d 1213 (5th Cir.), *cert. denied,* 404 U.S. 851 (1971). Therefore, it is not surprising that settlement has long been recognized as a favored method of resolving litigation and disputes. *Williams* v. *First National Bank,* 216 U.S. 582 (1910); *St. Louis Mining & Milling Co.* v. *Montana Mining Co.,* 171 U.S. 650 (1898). Judicial support for settlements has continued unvaryingly. See, e.g., *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321, 346-48 (1971).

In complex suits, such as class action antitrust actions, the reasons supporting the desirability of settlements are even more compelling. As the court declared in *Van Bronkhorst* v. *Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976):

> It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense. [Footnotes omitted.]

See also *Schlegel Manufacturing Co.* v. *USM Corp.,* 525 F.2d 775 (6th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976).

However, if a defendant considering settlement faced the prospect of further litigation of contribution claims after making his settlement payment, he would have little if any

incentive to settle. The benefits to an antitrust defendant of settling include relief from time-consuming and costly litigation (which often disrupts normal business operations) and agreeable compromise of a potential liability. But if a defendant remained liable for contribution after his settlement, he would be unable to limit the potential size of his liability. Moreover, defense of a contribution claim would force him back into the very dispute from which he sought peace. Settlement would lose that characteristic most meaningful to settlors—final and complete termination of potential liability in the case. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969). "Defendants [would] have little incentive to buy peace from plaintiffs if they may be obliged to litigate the same claims against other defendants." *In re Corrugated Container Antitrust Litigation,* 84 F.R.D. 40, 41 (S.D. Tex.), *aff'd per curiam,* 606 F.2d 319 (5th Cir. 1979), *cert. dismissed,* No. 79-972 (Oct. 20, 1980).

Since contribution would frustrate settlements, a valuable method for relieving courts of the congestion caused by complex antitrust cases would be crippled. When parties are eliminated from litigation at an early stage of the proceedings (or indeed at any time prior to trial), there are substantial cost savings to the parties and the judicial system. But if contribution were allowed against settling defendants, those seeking settlement would in effect be held ransom as long as any of their co-defendants preferred the risks and uncertainties of trial over settlement. Partial and overall settlements would accordingly be thwarted. Moreover, it is unrealistic to assume that early, overall settlements could be reached at one stroke, especially in antitrust price-fixing cases, typically having many plaintiffs and co-defendants and an unknown number of third-party defendants.

Contribution claims against settling antitrust defendants have been uniformly rejected. E.g., *Sabre Shipping Corp.* v. *American President Lines, Ltd., supra* (denying contribution and indemnification sought by five non-settling defendants who impleaded seventeen settlors as third-party defendants); *In re Ampicillin Antitrust Litigation,* 82 F.R.D. 647, 649 (D.D.C. 1979) (cross-claims for contribution against settling co-defendant rejected; contribution would undermine incentive to settle, since settling defendant was motivated to settle by a desire to "end its participation in this litigation"); *Hedges Enterprises* v. *Continental Group, Inc.,* 1979-1 Trade Cases ¶ 62,717 (E.D. Pa.) at 77,993 (it "would be futile to allow an amendment [of answer to assert cross-claim] because there is no right to contribution as against settling codefendants in antitrust litigation"); *In re Corrugated Container Antitrust Litigation, supra* (permitting cross-claims for contribution would frustrate settlements).[2]

Indeed, the only case permitting any form of contribution in an antitrust action, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.,* 594 F.2d 1179 (8th Cir. 1979), decided by a divided panel, did not involve a settling defendant at all. There the defendant, one of two alleged conspirators, sought to assert a right of contribution against a third-party non-defendant. No settlements had been made, and there was an allegation that the third-party

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[2] See also *In re Fine Paper Antitrust Litigation,* M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.,* No. 75-23-N (M.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979). Other antitrust cases rejecting contribution claims include: *Olson Farms, Inc.* v. *Safeway Stores, Inc.,* 1979-2 Trade Cases ¶ 62,995 (10th Cir.), *en banc rehearing granted,* No. 77-2068 (Dec. 27, 1979); *In re Beef Industry Antitrust Litigation,* 607 F.2d 167 (5th Cir. 1979), *petition for cert. pending sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n,* No. 79-1214 (filed Feb. 6, 1980); *El Camino Glass* v. *Sunglo Glass Co.,* 1977-1 Trade Cases ¶ 61,533 (N.D. Cal. 1976).

defendant had used its economic influence to prevent the plaintiff from including it as a defendant. The Eighth Circuit held that "under certain circumstances" an antitrust defendant may be entitled to contribution from other joint tortfeasors. However, in responding to the contention that contribution might serve as a possible deterrent to settlement, the majority indicated that it would not have permitted contribution against settling defendants (594 F.2d at 1184):

> The problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case. However, in the proper case the court should be able to fashion a rule of contribution which will protect the rights of settling defendants. [Citations omitted.]

Cases decided subsequent to *Professional Beauty Supply* have in fact interpreted the decision as precluding contribution against settling defendants. E.g., *In re Fine Paper Antitrust Litigation,* M.D.L. No. 323 (E.D. Pa. Aug. 3, 1979); *Alabama* v. *Blue Bird Body Co.,* No. 75-23-N (M.D. Ala. June 22, 1979), *appeal docketed,* No. 79-2667 (5th Cir. July 26, 1979).[3]

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[3] In contrast with the antitrust statutes, certain federal securities statutes provide that contribution can be asserted against "any person who, if sued separately, would have been liable to make the same payment." Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f); Securities and Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i (e), 78r(b) (similar language). With the recognition of implied rights of action under other sections of the securities laws, analogous contribution causes of action were also recognized. *Heizer Corp.* v. *Ross,* 601 F.2d 330 (7th Cir. 1979); *Globus, Inc.* v. *Law Research Service, Inc.,* 318 F.Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d. Cir.), *cert. denied,* 404 U.S. 941 (1971). This statutory background alone distinguishes contribution under the securities laws from that which might be implied under the antitrust laws. *Newark Motor Inn Corp.* v. *Holiday Inns, Inc.,* 1980-2 Trade Cases ¶ 63,465, at 76,457-58 (D.N.J.).

(footnote continued on next page)

Although petitioner Texas Industries, Inc. argues for a broadly stated "right" of "contribution", it advances no arguments that support the imposition of contribution liability on settling defendants. Indeed, in discussing methods of apportioning liability under a contribution rule, petitioner declares that "settling defendants must be relieved of any further liability" and urges adoption of a "rule that reduces the claim of a plaintiff who settles." (Petitioner's Brief at 27.) Such "claim reduction" (or "carve out")—which is also advocated by a number of *amici curiae*[4]—removes the settling defendant's share of liability from the plaintiff's claim.

"Claim reduction" of the type urged by petitioner and various *amici* has been implemented in certain non-antitrust

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Although the statutory language has led some district courts to recognize a contribution cause of action against settling defendants, these decisions have not actually implemented such contribution. See *McLean* v. *Alexander*, 449 F.Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 559 F.2d 1190 (3d Cir. 1979); *Muth* v. *Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975); *Altman* v. *Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972). Thus, even in the unique area of securities law, it appears that no court has applied federal law to grant the extraordinary relief of forcing settling defendants to pay sums in contribution in addition to the amounts they had already paid in their settlements. See also *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976). In *Herzfeld*, dealing with a situation in which a settlement, for more than the settled defendant's *pro rata* share of the final judgment, had already been reached, the Second Circuit denied contribution against the settling defendant on the grounds that "by the settlement its tort-feasor status had been removed" (540 F.2d at 39), using as an analogy N.Y. Gen. Obligations Law § 15-108(b), which makes good faith settlements a bar to contribution.

[4] *Amici* Georgia-Pacific Corporation, Packaging Corporation of America, The Mead Corporation, Westvaco Corporation, Weyerhaeuser Company and Willamette Corporation all advocate the use

(footnote continued on next page)

decisions dealing with non-statutory rights of contribution or interpreting statutes silent on the status of settling defendants. *In none of these cases, however, was a contribution cause of action recognized against settling defendants; in fact, their very thrust is that a contribution cause of action against a settling defendant is cut off by settlement.*[5] Thus, in *Gomes* v. *Brodhurst,* 394 F.2d 465, 468 (3d Cir. 1967), the Third Circuit, declaring that "[v]oluntary settlements are to be encouraged and a rule permitting contribution . . . would not work to that end," refused to impose contribution liability on a settling defendant. Similarly, in *Judson* v. *Peoples Bank & Trust Co.,* 17 N.J. 67, 110 A.2d 24 (1954), the New Jersey Supreme Court, in an opinion by Mr. Justice Brennan (then Justice of the New Jersey Supreme Court), accorded finality to the settlements which had been reached, and rejected a proposed contribution claim against the settling defendants as having "a stifling effect upon efforts at compromise and settlement, contrary to the policy of our law which strongly favors disposition of disputes by compromise and settlements." 17 N.J. at 92-93, 110 A.2d at 36. In both cases the plaintiff's judgment against a non-settling defendant was to be reduced by an amount which reflected the settling tortfeasor's respective share of fault.

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of claim reduction. See Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 25-29; Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 7; Brief of Westvaco Corporation as Amicus Curiae at 11; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae at 12-15.

[5] Compare *Glus* v. *G. C. Murphy Co.,* 23 Empl. Prac. Dec. ¶ 31,062 (3d Cir. 1980) and *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975), non-antitrust cases dealing with contribution claims by settling defendants against non-settling defendants in certain circumstances not applicable here.

See also *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) (maritime personal injury case not covered by Longshoremen's and Harbor Worker's Act); *Martello* v. *Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (applying law of District of Columbia); *Doyle* v. *United States*, 441 F.Supp. 701, 710-13 n.5 (D.S.C. 1977).

In fact, the modern trend in those states recognizing contribution (whether at common law or by statute) is against imposing contribution on settling defendants, with any contribution cause of action cut off by settlement.[6]

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[6] As one commentator has noted, "Nearly every state, in some way, protects from contribution the settling defendant who has been released by the plaintiff." Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829, 855 (1979) (footnote omitted).

The experience of the ten most populous states is illustrative. Of those, nine states exempt settling defendants from contribution liability by either statute or court decision (California, Cal. Civ. Proc. Code § 877; Florida, Fla. Stat. Ann. § 768.31; Illinois, Ill. Rev. Stat. Ann. (Supp. 1980) ch. 70, § 302; Massachusetts, Mass. Gen. Law Ann., Chap. 231B, § 4; Michigan, Mich. Comp. Laws Ann. § 600.2925d; New Jersey, *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954); New York, N.Y. Gen. Obligations Law § 15-108(b); Ohio, Ohio Rev. Code Ann. § 2307.32; Texas, Texas Rev. Civ. Stat. Ann. art. 2212a §§ 2(d), 2(e)); while only one of those states recognizes a right to contribution against settling defendants, under the statute it adopted in 1951 (Pennsylvania, 42 Pa. Cons. Stat. Ann. § 8327).

Two of the states present an interesting and informative contrast. Texas, by judicial decision, rejected contribution against settling defendants. *Palestine Contractors, Inc.* v. *Perkins*, 386 S.W.2d 764 (Tex. 1964). As noted above, this decision was codified in legislation which was adopted in 1973. New York, on the other hand, initially adopted a broad contribution policy that would apparently apply to all defendants, including those who settled. *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972). The New York legislature moved quickly to

(footnote continued on next page)

Moreover, experience in certain states where contribution against settling defendants has been statutorily permitted demonstrates the potentially destructive effect on antitrust settlements of contribution against settling parties. The 1939 Uniform Contribution Among Tortfeasors Act (U.C.A.T.) permitted contribution against settling defendants. However, the 1955 revised U.C.A.T. changed the rule to provide:

> When a release or covenant not to sue or not to enforce judgment is given in good faith . . . [i]t discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

The Commissioners' Note to § 4 of the revised Act stated that the 1939 provision permitting contribution against settling defendants was "one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption." It added that the effect of that provision of the 1939 Act had been "to discourage settlements in joint tort cases, by making it impossible for one tortfeaser alone to take a release and close the file."[7]

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reverse that portion of *Dole* applying contribution liability to settling defendants by enacting the above-cited legislation in 1974.

[7] The 1955 Act has been adopted by eleven states. The Uniform Comparative Fault Act was promulgated in 1977 as an alternative to the 1955 Act for those states adopting the comparative fault principle. Uniform Comparative Fault Act, Commissioners' Prefatory Note, reprinted in 12 Uniform Law Ann. 32 (Supp. 1980). The Uniform Comparative Fault Act imposes liability on the basis of the proportionate fault of the parties involved. *Id.* Section 6 of the Act provides in part that a release, covenant not to sue or similar agreement entered into by a claimant and a person liable "discharges that person from all liability for contribution . . . ." Section 6 also adopts a form of claim reduction by providing that the claim of the releasing person against other persons "is reduced by the amount of the released person's equitable share of the obligation," determined in accordance with other provisions in the Act. *Id.* at 41.

Courts and legislatures have thus recognized the detrimental effect that a right of contribution against settling defendants would have on settlements. Whatever the merits of contribution against non-settling defendants or alleged third-party co-conspirators, it plainly is inappropriate against defendants who have compromised their antitrust claims with plaintiffs.

Even those advocating a broad right of contribution in antitrust cases have not proposed that it be extended to settling defendants. A bill permitting contribution against non-settling defendants and third parties in price-fixing cases was introduced in Congress in May 1979. It was subsequently reported out of committee in November 1979. S. 1468, 96th Cong., 1st Session (1979). The bill expressly excluded defendants who entered into settlements in good faith.[8] See also Resolutions and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder (Aug. 17, 1979), reprinted in 936 *Antitrust & Trade Reg. Rep.* (BNA)

[8] The introduction of S. 1468 underscores the wisdom of deferring to Congress on the question of contribution among antitrust tortfeasors generally and against settling defendants in particular. Formulating a comprehensive and coherent contribution rule for all antitrust cases requires resolution of a myriad of interdependent issues, many of which are not before the Court on this petition. Among those issues are: the types of antitrust violations for which contribution would be allowed, the basis of apportionment among non-settling defendants in each kind of case, and the availability of claim reduction. In addition, many of the issues raised or sought to be raised by the petition turn on the resolution of empirical questions which Congress is better equipped to answer—questions concerning, for example, the settlement impact of contribution and claim reduction, the deterrent impact of a contribution as compared to a no-contribution rule, and the prevalence and causes of so-called "whipsaw" settlements.

E-1, at p. E-3 (proposed statute would prohibit contribution by or against a settling defendant; "To make certain contribution rights do not discourage settlements, it is essential to permit a party to settle a case once and for all"); Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540, 1551-55 (1980).

II.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD NOT PROMOTE FAIRNESS

In sanctioning contribution in the particular factual situation before it, the Eighth Circuit in *Professional Beauty Supply, supra,* sought to achieve "fairness between the parties" and "justice"; it felt that those ends are not served when one tortfeasor is permitted to shoulder more than its share of responsibility "because of the plaintiff's whim or spite [in not naming an alleged co-conspirator as a co-defendant], or his collusion with the other wrongdoer." 594 F.2d at 1185-86 (citation omitted). But this concern over the accused going free—which pervades petitioner's brief (e.g., pp. 16-18)—is inapplicable where settling defendants are involved, since they will have already resolved the plaintiffs' claims against them. *In re Ampicillin Antitrust Litigation, supra,* 82 F.R.D. at 650.

In the *Corrugated Container* litigation, for example, defendants have already paid $300 million to plaintiffs—even though they deny any liability. By no stretch of the imagination can it be said that they have escaped scot-free or colluded with plaintiffs. Indeed, *amicus curiae* Mead characterizes those settlements as "extortionate". (Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 12.) Moreover, all those settlements, except those not yet ruled upon, have been found fair and reasonable by the District Court in carrying

out its responsibilities on behalf of the class in accordance with Rule 23 of the Federal Rules of Civil Procedure.

Although petitioner argues that contribution will ensure "good faith settlements based upon the merits of the case" (Petitioner's Brief at 19), and although certain *amici* complain of the coercive tactics used by plaintiffs' counsel in antitrust cases, particularly class actions, leading to settlement "stampedes",[9] they do not suggest how a contribution cause of action against settling defendants will lead to fair settlements. Indeed, petitioners and those *amici* never even address this issue, asserting instead that the interests of settling defendants in obtaining peace can be achieved through the application of "claim reduction" (or "carve out")—a markedly different concept than contribution.[10]

Petitioner therefore in effect concedes that, far from promoting fairness, a contribution cause of action against settling defendants would only create great inequities. Those inequities are illustrated in stark fashion in the *Corrugated Container* litigation. Defendants there entered into settlement agreements and paid unprecedented sums

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[9] See Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 8-11, 16-19; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 6-14; Brief of Westvaco Corporation as Amicus Curiae at 9-11.

[10] See Petitioner's Brief at 26-27 (advocating a rule that reduces the claim of a plaintiff who settles with one of multiple defendants by the settling defendant's *pro rata* share, and releases the settling defendant from any further liability); Brief of Amicus Curiae The Mead Corporation in Support of Petitioner Texas Industries, Inc. at 7; Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae at 25-29; Brief of Westvaco Corporation as Amicus Curiae at 11; Brief of Weyerhaeuser Company and Willamette Industries, Inc. as Amici Curiae at 12-15.

in order to settle completely all class plaintiffs' claims in that litigation and thereby avoid the disruption, inconvenience and expense of preparing for and undergoing trial, as well as the risk of potential judgment liability for the massive amounts being claimed by plaintiffs. Although they understood that they had fully discharged their liability to the plaintiff class and bought their peace, they would achieve neither benefit of settlement if settling defendants were made subject to contribution and if such a rule were retroactively applied to these defendants. And since due process requires that settling defendants be given their "day in court" on the issue of culpability prior to any imposition of contribution, they would find themselves right back in the thick of further protracted litigation if the trial verdict in favor of the plaintiffs were upheld on appeal and if settling defendants were subject to contribution. In sum, establishment of a contribution cause of action against settling defendants could frustrate both of the major reasons which led these *amici* to enter into the settlements.

To permit contribution against settling defendants would consequently create unfairness where there are no competing equities. Compelling defendants once again to undertake the expenses and risks of litigation would represent a clear and substantial hardship and engender the very unfairness contribution is designed to prevent.

III.

A CONTRIBUTION CAUSE OF ACTION AGAINST SETTLING ANTITRUST DEFENDANTS WOULD COMPLICATE AND LENGTHEN ALREADY BURDENSOME LITIGATION

This Court has recently reaffirmed the importance of considering burdens on judicial administration when decid-

ing rules of antitrust law. *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). Permitting contribution claims against settling defendants would significantly complicate and further protract antitrust litigation which already places enormous strains on the federal court system.

A settling defendant facing potential liability for contribution claims would be forced back into litigation—either in the same case from which the settling defendant had sought to extricate himself or, more likely, *in a further action following the completion of the first case.* While compelling any defendant to remain a party to antitrust litigation inevitably consumes more court time and adds more complexity to the case, the bizarre position that settling defendants would find themselves in (i.e., settled with the plaintiffs but in controversy with the defendants who have not settled) would increase the complexity of the case by several orders of magnitude.

Such complexity would almost invariably require that contribution claims against settling defendants be tried in a separate set of complex proceedings, undertaken *after* adjudication of plaintiffs' remaining disputes against non-settling defendants, but without benefit of any of the findings of fact made at the first trial.[11] Indeed, non-settling defendants would argue that a single trial embracing contribution claims against settling defendants would put them

[11] Rule 42(b) of the Federal Rules of Civil Procedure provides the authority to order a separate trial of third party claims ". . . in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy . . . ." See, e.g., *Piedmont Interstate Fair Ass'n* v. *Bean,* 209 F.2d 942 (4th Cir. 1954); *Shippers Pre-Cooling Service* v. *Macks,* 181 F.2d 510 (5th Cir.), *cert. denied,* 340 U.S. 816 (1950); *In re Paris Air Crash of March 3, 1974,* 69 F.R.D. 310 (C.D. Cal. 1975); *Beights* v. *W. R. Grace & Co.,* 67 F.R.D. 81 (W.D. Okla. 1975).

in an awkward and difficult position: they would be compelled to argue that they were not guilty of any Sherman Act violation, while at the same time contending that *if* they did participate in such a violation, the settling defendants were also participants. Likewise, settling defendants would find themselves in the posture of arguing their innocence of wrongdoing while claiming, in the alternative, that non-settling defendants were primarily responsible for any wrongdoing.

A likely separate trial on the contribution claim against settling defendants should be contrasted with the situation in which contribution is sought against a *non*-settling defendant. Such a defendant, whether brought into the original suit initially by the plaintiff or impleaded by the other defendant(s) (e.g., *Professional Beauty* and this case), would have had his liability—i.e., whether or not he participated in a Sherman Act violation which caused plaintiff injury—already determined at trial. Similarly, in a contribution suit between judgment debtors designed to rectify the disproportionate collection of the judgment against the contribution claimant, there would be no need for a further proceeding to determine the question of guilt or innocence, which would already have been resolved by the judgment involved. Thus, imposing contribution liability on settling defendants would create unique and serious problems for the judicial administration of already complex cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should not, directly or by implication, establish or recognize a cause of action for contribution against settling antitrust defendants.

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